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SUPREME COURT, U. S.

No. 71-406

In the Supreme Court of the United States

OCTOBER TERM, 1971

RICHARD S. MISCHLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a second jury trial on two counts (Counts 6 and 7 of the original indictment) in the United States District Court for the District of New Jersey, petitioner was convicted of one count (Count 7) of making or causing to be made false entries in the accounts receivable ledger of a member bank of the Federal Reserve System, in violation of 18 U.S.C. 1005. He was sentenced to pay a fine of $3,500. The court of appeals affirmed (Pet. App. B).

Petitioner contends that the dismissal by the court during the first trial of the charge of conspiracy, *inter alia,* to make or cause to be made false entries in the books of the bank precluded his re-trial on the substantive offense (Pet. 2); he also argues that he

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was prejudiced by the jury's consideration of the evidence on Count 6. A motion for acquittal was granted on Count 6 but only after the verdict (Pet. 2.). The rather complicated facts surrounding these contentions are not in dispute and are set forth in the opinion below, on which we rely. As that opinion shows, petitioner's re-trial was not barred, since the sole basis for dismissing the conspiracy count at the first trial was that the conspiracy proved did not have as its object the substantive violations alleged therein, including the count which was the subject of the second trial (Pet. App. B 6–11). The commission of the substantive act, however, did not require a conspiracy. The court of appeals also properly concluded that the proof as to Count 6, on which the motion for acquittal was granted after the second trial, was distinct from the proof as to Count 7 on which petitioner was convicted, so that no prejudice resulted from the delay in ruling on the motion for acquittal (Pet. App. B 14–15).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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[1] This was clearly correct since Count 6 involved a charge of making fraudulent statements to the Small Business Administration, and was readily distinguishable from Count 7 on which petitioner was found guilty.

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